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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 31, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALICIA M.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:19-CV-0249-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney David L. Lybbert represents Alicia M. (Plaintiff); Special Assistant United States Attorney Lisa Goldoftas represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income in June 2016, alleging disability since March 2, 2016, due to vertebra fractures (several body traumas spine); migraines; nine

shattered vertebra, three compressed; back pain; eight broken ribs; punctured liver; punctured lung; chronic pain in joints; anxiety attacks; depression; hernias, five hernia repairs; and traumatic brain trauma. Tr. 337, 339, 365. The applications were denied initially and upon reconsideration. Administrative Law Judge (ALJ) Kimberly Boyce held a hearing on December 5, 2017, Tr. 47-86, and issued an unfavorable decision on June 18, 2018, Tr. 24-41. The Appeals Council denied Plaintiff's request for review on May 22, 2019. Tr. 1-6. The ALJ's June 2018 decision thus became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 18, 2019. ECF No. 1.

STATEMENT OF FACTS

12 Plaintiff was born on December 5, 1979, Tr. 53, and was 36 years old on the
13 alleged onset date, March 2, 2016. She completed two years of college, earning an
14 associate degree in 2015. Tr. 53-54, 366. Plaintiff testified at the administrative
15 hearing on December 5, 2017, that she worked part-time watching her nieces and
16 nephews while attending community college between 2013 and 2015. Tr. 54-55,
17 62-63. Plaintiff's disability report indicates she also has past work as a compliance
18 clerk, a massage therapist, an office manager, and a personal assistant. Tr. 367.
19 Plaintiff's disability report indicates she stopped working in 2011 because of her
20 conditions. Tr. 366.

21 Plaintiff testified at the administrative hearing that her physical problems
22 were caused by car accidents. Tr. 64. She suffered fractured vertebrae and ribs
23 and incurred multiple hernias. Tr. 64. She stated, as a result, she has limited range
24 of motion in her neck and experiences severe headaches two to three times a week.
25 Tr. 65. She indicated she also has muscle spasms in her back and stomach. Tr. 67.
26 Plaintiff reported she had been prescribed several different narcotic medications
27 for her pain throughout the years and, at the time of the hearing, took pain pills five
28 times a day. Tr. 59-60, 67.

1 Plaintiff stated she was only able to walk about a block and a half before
2 needing to sit or lie down, stand in one place for five minutes before needing to sit
3 or lie down, sit for 15 to 30 minutes before needing to switch positions, and carry
4 no more weight than a gallon of milk. Tr. 68-69, 74. She indicated her physical
5 symptoms prevented her from doing any household chores about three times a
6 week. Tr. 76.

7 With respect to her mental health, Plaintiff testified she has experienced
8 depression and anxiety since her 2011 automobile accidents. Tr. 70. She indicated
9 she had flashbacks of the accidents and resultant difficulty with sleep at night, as
10 well as problems with focus and concentration. Tr. 70-71, 75. She reported taking
11 anti-anxiety medication three times a day. Tr. 71.

12 **STANDARD OF REVIEW**

13 The ALJ is responsible for determining credibility, resolving conflicts in
14 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
15 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
16 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
17 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
18 only if it is not supported by substantial evidence or if it is based on legal error.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
20 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
21 1098. Put another way, substantial evidence is such relevant evidence as a
22 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
23 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
24 rational interpretation, the Court may not substitute its judgment for that of the
25 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
26 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
27 administrative findings, or if conflicting evidence supports a finding of either
28 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*

1 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
 2 supported by substantial evidence will be set aside if the proper legal standards
 3 were not applied in weighing the evidence and making the decision. *Brawner v.*
 4 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

5 **SEQUENTIAL EVALUATION PROCESS**

6 The Commissioner has established a five-step sequential evaluation process
 7 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 8 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 9 proof rests upon the claimant to establish a *prima facie* case of entitlement to
 10 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
 11 claimant establishes that a physical or mental impairment prevents the claimant
 12 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
 13 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
 14 shifts to the Commissioner to show (1) the claimant can make an adjustment to
 15 other work; and (2) the claimant can perform specific jobs that exist in the national
 16 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th
 17 Cir. 2004). If a claimant cannot make an adjustment to other work in the national
 18 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

19 **ADMINISTRATIVE DECISION**

20 On June 18, 2018, the ALJ issued a decision finding Plaintiff was not
 21 disabled as defined in the Social Security Act.

22 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 23 activity since March 2, 2016, the alleged onset date. Tr. 27.

24 At step two, the ALJ determined Plaintiff had the following severe
 25 impairments: traumatic brain injury (TBI), an affective disorder, an anxiety
 26 disorder, a personality disorder, and degenerative disc disease. Tr. 28.
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 28 ///

1 At step three, the ALJ found Plaintiff did not have an impairment or
2 combination of impairments that meets or medically equals the severity of one of
3 the listed impairments. Tr. 28.

4 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
5 Plaintiff could perform light exertion level work with the following limitations:
6 she could stand and/or walk for about four hours and sit for about six hours in an
7 eight-hour workday with normal breaks; she could never climb ladders, ropes or
8 scaffolds, work at unprotected heights or in proximity to hazards, such as heavy
9 machinery and dangerous moving parts; she could occasionally climb ramps and
10 stairs, stoop, kneel, crouch, and crawl; she could perform work in which
11 concentrated exposure to extreme cold, heat or vibration was not present; in order
12 to meet ordinary and reasonable employer expectations, she could understand,
13 remember and carry out unskilled, routine and repetitive work that could be
14 learned by demonstration, and in which tasks to be performed were predetermined
15 by the employer; she could cope with occasional work setting change and
16 occasional interaction with supervisors; she could work in proximity to coworkers,
17 but not in a team or cooperative effort; and she could perform work that did not
18 require interaction with the general public as an essential element of the job, but
19 occasional incidental contact was not precluded. Tr. 30.

20 At step four, the ALJ found Plaintiff was not able to perform any of her past
21 relevant work. Tr. 39-40.

22 At step five, the ALJ determined that, based on the testimony of the
23 vocational expert, and considering Plaintiff's age, education, work experience, and
24 RFC, Plaintiff was capable of making a successful adjustment to other work that
25 exists in significant numbers in the national economy, including the jobs of
26 production assembler, electronics worker, and mail clerk. Tr. 40-41.

27 ///

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The ALJ thus concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from March 2, 2016, the alleged onset date, through the date of the ALJ's decision, June 18, 2018. Tr. 40.

ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards.

8 Plaintiff raises the following issues on review: (1) Did the ALJ err in
9 improperly rejecting the opinions of Plaintiff's treating and examining providers;
10 (2) Did the ALJ err in improperly rejecting Plaintiff's subjective complaints;
11 (3) Did the ALJ err in failing to meet her burden at step five, to identify specific
12 jobs, available in significant numbers, which Plaintiff could perform in light of her
13 specific functional limitations; and (4) Did the ALJ err in failing to consider
14 Chronic Pain and Fibromyalgia as severe conditions and factor them into the
15 overall determination of limitations? ECF No. 13 at 9-10.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff argues the ALJ erred by failing to properly consider the medical opinion evidence of record. Plaintiff specifically asserts the ALJ erred by rejecting the opinions of treating doctor Randel Bunch, M.D., and examining medical professional Thomas Genthe, Ph.D., and instead relying on the opinions of nonexamining state agency medical consultants. ECF No. 13 at 11-15.

In a disability proceeding, the courts distinguish among the opinions of three types of acceptable medical sources: treating physicians, physicians who examine but do not treat the claimant (examining physicians) and those who neither examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is

1 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
2 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. The Ninth Circuit has
3 held that “[t]he opinion of a nonexamining physician cannot by itself constitute
4 substantial evidence that justifies the rejection of the opinion of either an
5 examining physician or a treating physician.” *Lester*, 81 F.3d at 830; *Pitzer v.*
6 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) (finding a nonexamining doctor’s
7 opinion “with nothing more” does not constitute substantial evidence).

8 In weighing the medical opinion evidence of record, the ALJ must make
9 findings setting forth specific, legitimate reasons for doing so that are based on
10 substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
11 Cir. 1989). The ALJ must also set forth the reasoning behind his or her decisions
12 in a way that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d
13 487, 492 (9th Cir. 2015).

14 On July 22, 2017, state agency physician Guillermo Rubio, M.D. reviewed
15 the record and opined that Plaintiff could perform light exertion level work
16 (occasionally lift and/or carry 20 pounds and frequently lift and/or carry 10
17 pounds) and stand and/or walk and sit (with normal breaks) about six hours in an
18 eight hour workday with some postural and environmental restrictions. Tr. 188-
19 189. Also on July 22, 2016, reviewer John D. Gilbert, Ph.D., found Plaintiff was
20 capable of understanding and remembering simple one to three step repetitive
21 tasks, would have interruptions in concentration, persistence and pace at times due
22 to subjective perception of pain and psychological symptoms, and would retain the
23 ability to carry out routine labor within customary tolerances during a normal
24 workday and workweek. Tr. 190. He determined Plaintiff was able to interact
25 with the public on an occasional/superficial basis and that interactions with
26 supervisors and coworkers could occur on a more frequent basis. Tr. 191.

27 Nonexamining state agency consultant Howard Platter, M.D., opined on
28 November 25, 2016, that Plaintiff could perform light exertion level work

1 (occasionally lift and/or carry 20 pounds and frequently lift and/or carry 10
2 pounds) and stand and/or walk for four hours and sit (with normal breaks) about
3 six hours in an eight hour workday with some postural and environmental
4 restrictions. Tr. 219-221. On November 21, 2016, reviewer Jerry Gardner, Ph.D.,
5 determined Plaintiff was capable of understanding and remembering simple one to
6 three step instructions without difficulty as well as some more detailed tasks and
7 capable of persisting at routine simple tasks in at least two-hour intervals. Tr. 221-
8 222. He opined Plaintiff's concentration, persistence and pace were intermittently
9 limited by pain and psychological symptoms, but not so as to preclude productive
10 activity in a competitive employment environment. Tr. 222. He limited Plaintiff
11 to occasional interaction with the public, coworkers and supervisors and indicated
12 she would work best in a stable, low pressure setting. Tr. 223.

13 A few months prior to the alleged onset date (March 2, 2016), in contrast to
14 the opinions of the above nonexamining medical professionals, examining medical
15 professional J. Brooke Sjostrom, M.S., LMHC, opined that Plaintiff had several
16 marked and moderate limitations with respect to her ability to perform basic work
17 activities. Tr. 495-499. In addition, on November 16, 2015, Randel S. Bunch,
18 M.D., Plaintiff's treating physician, completed a physical functional evaluation
19 form and found that as a result of Plaintiff's back pain, joint pain, neck pain and
20 abdominal pain, she was restricted to sedentary level work (lifting 10 pounds
21 maximum). Tr. 503-504.

22 After the alleged onset date, on May 17, 2016, Thomas Genthe, Ph.D.,
23 completed a psychological/psychiatric evaluation of Plaintiff. Tr. 564-572.
24 Plaintiff reported her highest education level as attaining her GED and indicated
25 she last worked in 2012 as a personal assistant for an insurance company. Tr. 565.
26 Dr. Genthe diagnosed major depressive disorder, unspecified; other specified
27 anxiety disorder; and other specified personality disorder (with borderline
28 features), Tr. 566, and checked boxes indicating Plaintiff was markedly impaired

1 in her abilities to maintain appropriate behavior in a work setting and complete a
2 normal work day and work week without interruptions from psychologically based
3 symptoms, Tr. 567. Dr. Genthe completed another psychological/psychiatric
4 evaluation of Plaintiff on October 3, 2017. Tr. 737-745. Plaintiff again reported
5 her highest education level as attaining her GED and that she last worked in 2012
6 as a personal assistant for an insurance company. Tr. 738. Dr. Genthe diagnosed
7 borderline intellectual functioning; major depressive disorder, unspecified; post-
8 traumatic stress disorder; and other specified personality disorder (with borderline
9 features), Tr. 739, and checked boxes indicating Plaintiff had several moderate and
10 marked limitations with her basic work activities, Tr. 739-740. Dr. Genthe opined
11 Plaintiff was unlikely to function adequately in a work setting until her
12 psychological symptoms had been managed more effectively. Tr. 740.

13 The ALJ noted at the administrative hearing that when Plaintiff was seen by
14 Dr. Genthe, she did not mention she had obtained an AA, only that she had a GED,
15 nor did she inform the doctor that she had worked as a caretaker for her siblings'
16 children for three years (2013-2015), only that she last worked in 2012 as a
17 personal assistant for an insurance agency. Tr. 56-57. Plaintiff was not able to
18 explain why she omitted this information, other than to state that her anxiety "gets
19 the best of me" causing her to not recall things. Tr. 57.

20 On November 22, 2017, Dr. Bunch completed a Physical Medical Source
21 Statement form for Plaintiff. Tr. 826-829. He indicated, in an eight-hour workday,
22 Plaintiff could sit for three to four hours, stand for one to two hours, walk for one
23 to two hours, and lift and carry 11 to 20 pounds seldomly and up to 10 pounds
24 occasionally. Tr. 826-827. Dr. Bunch noted several postural and environmental
25 limitations. Tr. 827-828. On the form, he circled he "agreed" Plaintiff would need
26 more than the scheduled breaks of 10 minutes or more throughout the day, would
27 likely miss work or leave early at least two to three days per month due to flare-ups
28 of symptoms, was unlikely to tolerate production level work, was likely to

1 experience marked problems with focus and concentration for extended periods,
2 and would need to elevate one or both legs. Tr. 828.

3 In reaching her RFC determination, the ALJ accorded “little weight” to
4 treating physician Bunch, examining doctor Genthe and Ms. Sjostrom, and instead
5 accorded controlling weight to the nonexamining state agency reviewers. Tr. 32-
6 39.

7 While the report of Ms. Sjostrom and one of the reports of Dr. Bunch
8 predate the alleged onset date in this case, *see Fair v. Bowen*, 885 F.2d 597, 600
9 (9th Cir. 1989) (finding medical opinions that predate the alleged onset of
10 disability are of limited relevance), their opinions, coupled with the post-onset date
11 conclusions of examining physician Genthe and treating physician Bunch, indicate
12 Plaintiff’s functioning is limited to a greater extent than as expressed by the
13 nonexamining medical professionals. And, as noted above, the opinion of
14 nonexamining physicians cannot alone justify the rejection of the opinion of either
15 an examining physician or a treating physician. *Lester*, 81 F.3d at 830. The ALJ
16 did not cite any other medical source opinion evidence, other than the above
17 nonexamining medical professionals, in support of her conclusions with respect to
18 Plaintiff’s level of functioning.

19 The ALJ stated that the opinions of Dr. Bunch, Dr. Genthe and Ms. Sjostrom
20 were accorded “little weight” because Plaintiff’s physical exams during the period
21 at issue were generally normal and mental health treatment notes during the period
22 at issue were generally normal and did not support marked mental limitations. Tr.
23 35-39. Although the ALJ specifically mentions Plaintiff’s muscle tone and
24 strength were normal and there were no neurological deficits, Tr. 35, and that
25 various mental health findings on exam were “normal,” Tr. 37, 39, the Court finds
26 the ALJ failed to describe how particular record evidence specifically contradicted
27 the opinions of Dr. Bunch, Dr. Genthe and Ms. Sjostrom. *See Brown-Hunter*, 806
28 F.3d at 492 (finding the agency must set forth reasoning behind its decisions in a

1 way that allows for meaningful review); *Treichler v. Comm'r of Soc. Sec. Admin.*,
2 775 F.3d 1090, 1103 (9th Cir. 2014) (“Although the ALJ’s analysis need not be
3 extensive, the ALJ must provide some reasoning in order for us to meaningfully
4 determine whether the ALJ’s conclusions were supported by substantial
5 evidence.”).

6 Based on the foregoing, the ALJ’s rationale for discounting the reports of
7 Dr. Bunch, Dr. Genthe and Ms. Sjostrom is not properly supported, and the
8 opinions of the nonexamining medical professionals cannot alone justify the
9 rejection of the opinions of the treating and examining medical professionals. The
10 Court thus finds the ALJ erred by failing to provide cogent, specific and legitimate
11 reasons, supported by substantial evidence, for rejecting their opinions. A remand
12 is required for reconsideration of the reports of Dr. Bunch, Ms. Sjostrom¹ and Dr.
13 Genthe and for further development of the record.

14 **B. New Evidence**

15 Plaintiff’s motion requests that the Court also take into consideration another
16 psychological/psychiatric evaluation completed by Dr. Genthe on October 20,
17 2018, after the administrative proceedings and while the matter was pending
18 review at the Appeals Council. ECF No. 13 at 9; Tr. 12-20.

19 The Appeals Council considered the new evidence and made it a part of the
20 administrative record at Tr. 12-20. *See Harman v. Apfel*, 211 F.3d 1172, 1179-
21 1180 (9th Cir. 2000) (stating that where claimant submitted additional materials to

22
23 ¹The Court notes Ms. Sjostrom’s report, Tr. 495-499, and Dr. Bunch’s
24 November 2015 physical functional evaluation form, Tr. 503-504, predate the
25 relevant time period in this action and are thus of limited relevance. *Fair*, 885 F.2d
26 at 600. On remand, the ALJ shall be instructed to review these medical reports and
27 accord them appropriate weight to the extent they are found to address Plaintiff’s
28 condition during the relevant period at issue in this matter.

1 the Appeals Council in requesting review of the ALJ’s decision, “[w]e may
 2 properly consider the additional materials because the Appeals Council addressed
 3 them in the context of denying Appellant’s request for review”); *Ramirez v.*
 4 *Shalala*, 8 F.3d 1449, 1451-1452 (9th Cir. 1993) (noting that where the Appeals
 5 Council declined to review the decision of the ALJ after examining the entire
 6 record, including new material, we considered both the ALJ’s decision and the
 7 additional materials submitted to the Appeals Council).

8 Because this matter is being remanded for additional proceedings to remedy
 9 the ALJ’s errors as to the medical opinion evidence of record, *see supra*, on
 10 remand, the ALJ shall consider Dr. Genthe’s October 20, 2018, report, Tr. 12-20,
 11 as it relates to the period on or before the date of the ALJ’s decision.

12 C. Plaintiff’s Subjective Complaints

13 Plaintiff contends the ALJ also erred by improperly rejecting her subjective
 14 complaints. ECF No. 13 at 15-17. The Court agrees.

15 It is the province of the ALJ to make credibility determinations. *Andrews*,
 16 53 F.3d at 1039. However, the ALJ’s findings must be supported by specific
 17 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once
 18 the claimant produces medical evidence of an underlying medical impairment, the
 19 ALJ may not discredit testimony as to the severity of an impairment because it is
 20 unsupported by medical evidence. *Reddick*, 157 F.3d 715, 722 (9th Cir. 1998).
 21 Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting the
 22 claimant’s testimony must be “specific, clear and convincing.” *Smolen*, 80 F.3d at
 23 1281; *Lester*, 81 F.3d at 834. “General findings are insufficient: rather the ALJ
 24 must identify what testimony is not credible and what evidence undermines the
 25 claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
 26 918 (9th Cir. 1993).

27 The ALJ concluded Plaintiff’s medically determinable impairments could
 28 reasonably be expected to cause her alleged symptoms; however, Plaintiff’s

1 statements concerning the intensity, persistence and limiting effects of those
2 symptoms were not entirely consistent with the medical and other evidence of
3 record. Tr. 32.

4 The ALJ determined that “the objective findings in this case fail to provide
5 support for the claimant’s allegations of disabling symptoms and limitations.” Tr.
6 32. A lack of supporting objective medical evidence is a factor which may be
7 considered in evaluating an individual’s credibility, provided it is not the sole
8 factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991). In assessing a
9 Plaintiff’s testimony, an ALJ may consider whether the alleged symptoms are
10 consistent with the medical evidence; however, an ALJ may not make a negative
11 credibility finding “solely because” the claimant’s symptom testimony “is not
12 substantiated affirmatively by objective medical evidence.” *Robbins v. Soc. Sec.
Admin.*, 466 F3d 880, 883 (9th Cir. 2006).

14 Here, the ALJ summarized the record evidence pertaining to Plaintiff’s
15 physical and mental impairments, Tr. 32-34, but failed to articulate what specific
16 allegation of Plaintiff was undermined by the treatment notes, evaluations and
17 reports.

18 The Ninth Circuit has determined that an ALJ errs “by making only a single
19 general statement that the claimant’s statements concerning the intensity,
20 persistence and limiting effects of these symptoms are not credible to the extent
21 they are inconsistent with the [ALJ’s RFC determination], without identifying
22 sufficiently specific reasons for rejecting the testimony, supported by evidence in
23 the case record.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015)
24 (quotation marks and citation omitted); *see also Holohan v. Massanari*, 246 F.3d
25 1195, 1208 (9th Cir. 2001) (holding “the ALJ must specifically identify the
26 testimony she or he finds not to be credible and must explain what evidence
27 undermines the testimony”). In *Brown-Hunter*, the ALJ “simply stated her non-
28 credibility conclusion and then summarized the medical evidence supporting her

1 RFC determination,” which “is not the sort of explanation or the kind of ‘specific
2 reasons’ we must have in order to review the ALJ’s decision meaningfully . . . [to]
3 ensure that the claimant’s testimony was not arbitrarily discredited.” *Brown-*
4 *Hunter*, 806 F.3d at 494. The Ninth Circuit concluded “[b]ecause the ALJ failed to
5 identify the testimony she found not credible, she did not link that testimony to the
6 particular parts of the record supporting her non-credibility determination. This
7 was legal error.” *Id.* (citation omitted).

8 Like the ALJ in *Brown-Hunter*, ALJ Boyce failed to identify how the
9 summarized medical evidence specifically conflicted with Plaintiff’s reported
10 symptoms. The ALJ only generally stated that Plaintiff’s allegations of disabling
11 symptoms and limitations were not consistent with the objective findings of record.
12 This is not a valid, clear and convincing reason to discount subjective complaints.

13 The ALJ’s only other asserted reason for rejecting Plaintiff’s testimony is
14 that Plaintiff’s described daily activities were inconsistent with her complaints of
15 disabling symptoms and limitations. Tr. 32. Although it is well-established that
16 the nature of daily activities may be considered when evaluating a plaintiff’s
17 subjective symptoms, *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989), the ALJ
18 only generally mentions Plaintiff activities of daily living, Tr. 31-32. The ALJ did
19 not articulate in what way Plaintiff’s daily activities conflicted with her testimony.
20 This factor for discounting Plaintiff’s symptom reports is also unsupported.

21 The ALJ is responsible for reviewing the evidence and resolving conflicts or
22 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
23 1989). This Court has a limited role in determining whether the ALJ’s decision is
24 supported by substantial evidence and may not substitute its own judgment for that
25 of the ALJ even if it might justifiably have reached a different result upon *de novo*
26 review. 42 U.S.C. § 405(g). It is the role of the trier of fact, not this Court, to
27 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. However, based on
28 the foregoing, the Court concludes that the rationale provided by the ALJ for

1 discounting Plaintiff's testimony is inadequate. Therefore, Plaintiff's subjective
2 symptoms must be reassessed on remand. On remand, the ALJ shall reconsider
3 Plaintiff's statements and testimony and reassess what statements, if any, are not
4 credible and, if deemed not credible, what specific evidence undermines those
5 statements.

6 **D. Severe Impairments**

7 Plaintiff also contends the ALJ erred at step two of the sequential evaluation
8 process by failing to consider all of Plaintiff's severe impairments. ECF No. 13 at
9 18-19. Plaintiff specifically asserts the ALJ failed to find Plaintiff's fibromyalgia
10 and/or chronic pain was a severe impairment. *Id.*

11 Plaintiff has the burden of proving that she has a severe impairment at step
12 two of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §
13 416.912. In order to meet this burden, Plaintiff must furnish medical and other
14 evidence that shows she has a severe impairment. 20 C.F.R. § 416.912(a). The
15 regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is
16 severe if it significantly limits one's ability to perform basic work activities.

17 The Court notes Plaintiff's disability report fails to mention fibromyalgia as
18 an issue causing her alleged disability. *See* Tr. 365. Moreover, Plaintiff did not
19 raise fibromyalgia as restricting her functionality at the time of the administrative
20 hearing. Nevertheless, Plaintiff's treating physician Bunch mentions fibromyalgia
21 in his assessment and treatment of Plaintiff. *See* Tr. 595, 828.

22 Given the ALJ's erroneous determinations regarding the medical opinion
23 evidence of record and Plaintiff's subjective complaints and the resultant necessity
24 of a remand to remedy these defects, on remand the ALJ shall additionally
25 reexamine the severity of Plaintiff's conditions at step two of the sequential
26 evaluation process and specifically address the impact of Plaintiff's fibromyalgia
27 and/or chronic pain, if any.

28 ///

1 **E. Step Five**

2 Plaintiff contends that the ALJ erred at step five of the sequential evaluation
3 process. ECF No. 13 at 17-18. Plaintiff argues the ALJ's RFC and hypothetical to
4 the vocational expert failed to account for all of her limitations as assessed by Drs.
5 Bunch and Genthe. *Id.*

6 As determined above, the ALJ erred by providing inadequate reasoning for
7 according little weight to the opinions of Drs. Bunch and Genthe and insufficient
8 rationale for finding Plaintiff lacked credibility. *See supra.* The ALJ's RFC
9 determination is thus not supported by substantial record evidence.

10 Plaintiff's RFC is an administrative finding, dispositive of the case, which is
11 reserved to the Commissioner, and, by delegation of authority, to the ALJ. SSR
12 96-5p. It is the responsibility of the ALJ, not this Court, to make a RFC
13 determination. Accordingly, Plaintiff's RFC must be redetermined, on remand,
14 taking into consideration the opinions of the medical professionals noted above, as
15 well as any additional or supplemental evidence relevant to Plaintiff's claim for
16 disability benefits. If warranted, the ALJ shall also obtain supplemental testimony
17 from a vocational expert with respect to the new RFC determination.

18 **CONCLUSION**

19 Plaintiff argues the ALJ's decision should be reversed and remanded for the
20 payment of benefits. ECF No. 13 at 19-20. The Court has the discretion to remand
21 the case for additional evidence and findings or to award benefits. *Smolen*, 80 F.3d
22 at 1292. The Court may award benefits if the record is fully developed and further
23 administrative proceedings would serve no useful purpose. *Id.* Remand is
24 appropriate when additional administrative proceedings could remedy defects.
25 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
26 finds that further development is necessary for a proper determination to be made.

27 On remand, the ALJ shall reconsider Plaintiff's physical and psychological
28 limitations. The ALJ shall reassess the opinions of Dr. Bunch, Dr. Genthe and Ms.

1 Sjostrom, including Dr. Genthe's October 2018 report, Tr. 12-20, and all other
2 medical evidence of record relevant to Plaintiff's claim for disability benefits. The
3 ALJ shall further develop the record by directing Plaintiff to undergo consultative
4 physical and psychological examinations to assist the ALJ in assessing Plaintiff's
5 functioning during the relevant time period. The ALJ shall reevaluate Plaintiff's
6 subjective complaints, formulate a new RFC determination, obtain supplemental
7 testimony from a vocational expert, if necessary, and take into consideration any
8 other evidence or testimony relevant to Plaintiff's disability claim.

9 Accordingly, **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is

11 **GRANTED IN PART.**

12 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is

13 **DENIED.**

14 3. The matter is **REMANDED** to the Commissioner for additional
15 proceedings consistent with this Order.

16 4. An application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
19 the file shall be **CLOSED**.

20 DATED August 31, 2020.



A handwritten signature in black ink, appearing to read "M".

21 JOHN T. RODGERS
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23 UNITED STATES MAGISTRATE JUDGE
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